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No. 96-451

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

NORTH MICHIGAN LAND & OIL CORPORATION, *et al.*,
Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the State of Michigan Court of Appeals

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BRIEF OF RESPONDENT CONSUMERS POWER COMPANY IN OPPOSITION

DAVID A. MIKELONIS
JON R. ROBINSON
FRANK R. KNOX
FRANCIS X. BERKEMEIER
CONSUMERS POWER COMPANY
212 W. Michigan Avenue
Jackson, Michigan 49201
(517) 788-0550

CARTER G. PHILLIPS *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Respondent Consumers Power Company

* Counsel of Record

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QUESTION PRESENTED

Whether the Michigan Public Service Commission's decision to exercise jurisdiction over a gas purchase contract between gas producers and a public utility and to declare the price term of the contract to be not "just and reasonable" violated any of petitioners' constitutional rights.

LIST OF PARTIES AND AFFILIATES

All of the parties to this proceeding are listed on the cover of the petition.

Pursuant to Rule 29.6 of the Rules of this Court, respondent Consumers Power Company states that it is a wholly owned subsidiary of CMS Energy Corporation.

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Respondent Consumers Power Company hereby opposes the petition for certiorari in this case.

STATEMENT OF THE CASE

1. Petitioners are natural gas producers in Michigan that supply gas to respondent pursuant to a contract dated July 1, 1977. Because of the price escalation provision in that agreement and the steadily dropping market price of natural gas, the cost to respondent of gas purchased from petitioners during the 1980s grossly exceeded the cost of alternative supplies. In 1987, the Michigan Public Service Commission ruled that respondent could not pass through to its consumers the full cost of natural gas purchased from petitioners under the 1977 agreement. In so doing, the Michigan Public Service Commission

specifically questioned respondent's prudence in failing to invoke the Commission's jurisdiction over intrastate gas sales to respondent pursuant to Act 9, Mich. Comp. Laws Ann. § 483.101 *et seq.* ("Act 9").

In 1988, respondent filed applications with the Michigan Public Service Commission ("PSC") asking it to exercise its jurisdiction to regulate intrastate gas contract prices pursuant to Act 9. Prior to the Commission ruling on those applications, respondent entered into agreements in 1989 to settle the dispute before the Commission concerning the cost of intrastate natural gas that respondent was purchasing. First, respondent settled with a group of its producers, including petitioners, to set a lower price for the period from 1986 through November 1991. Among other things, this general settlement agreement, which was approved by the Commission, provided that all parties reserved the right to contest any intrastate price or cost payable on December 1, 1991 or thereafter. Second, respondent entered into a separate Letter Agreement dated August 7, 1989, in which respondent agreed that after November 1991, it would purchase gas from petitioners under the terms of the original 1977 contract. This latter agreement was not submitted to the PSC for its review until the filing of the application which initiated this action.

2. On November 27, 1991, respondent filed an application with the Michigan Public Service Commission under Act 9 seeking a declaration that the price increase embodied in the August 1989 Letter Agreement was unjust and unreasonable, and asking the Commission to establish a just and reasonable price. Petitioners intervened and interposed a series of objections, including raising the constitutional issues presented to this Court.[1]

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[1] Petitioners have been quite litigious in this dispute. Not only have they pursued the issue all the way to this Court, but previously they filed suit in the United States District Court for the Eastern

After an extensive hearing, the Commission held that the price adjustment in the August 1989 Letter Agreement was subject to "just and reasonable" review pursuant to Section 10 of Act 9. The Commission further concluded that the price was unjust and unreasonable and set a ceiling price for gas sold pursuant to the 1977 contract. The Commission declined respondent's request to make the new price effective from the November 1991 date of the application, and the price change therefore became effective from the February 8, 1993 date of the Commission's order.

Petitioners raised the various constitutional issues they present here, but argued that the Commission lacked jurisdiction to consider them. The Commission did not disagree with the petitioners' suggestion, but nevertheless opined that its review of the reasonableness of the prices charged to a utility was constitutionally permissible. Pet. App. 57a-60a.

On appeal, the Michigan Court of Appeals affirmed the Commission. It held that the Commission has the authority to review the cost of natural gas sold to respondent and that the decision ordering the prices lowered to a

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District of Michigan raising many of the same issues they presented through the state court's review of the PSC's decision. That court abstained and the Sixth Circuit affirmed by unpublished order. *North Michigan Land & Oil Corp.* v. *Consumers Power Co.*, No. 93-1705 (6th Cir. Aug. 26, 1994).

In addition, petitioners have filed several other state law actions related to this dispute. In two separate actions commenced in different state circuit courts, petitioners (and another producer aligned with petitioner before the Commission) sought to raise essentially the same issues as were raised before the Commission. Those actions were dismissed by the circuit courts. *See* Grand Traverse County Circuit Court No. 95-13217-CK and Jackson County Circuit Court No. 95-72356-CK. The producers appealed those dismissals to the Michigan Court of Appeals, which consolidated the two appeals. *See* Court of Appeals Nos. 188362 and 188769. That court has yet to act on this set of appeals.

just and reasonable level was constitutionally permissible. The court of appeals denied rehearing on August 29, 1995 and the Michigan Supreme Court denied leave to appeal on June 28, 1996.

REASONS FOR DENYING THE PETITION

Petitioners struggle mightily to convert this run-of-the-mill state regulatory proceeding into a case of constitutional dimension. But their effort falls woefully short because there is no substantial federal constitutional question posed by regulatory review of the price that natural gas is sold to a public utility. Petitioners assert numerous constitutional violations, but for the reasons that follow, none poses any kind of serious challenge to the validity of the decisions below. Accordingly, the Court should deny the petition.

1. Petitioners argue (Pet. 12) that Act 9 violates the Equal Protection Clause because it grants respondent a right to petition the PSC to reduce contract costs, but provides no corresponding right to producers to seek an increase in the price at which they sell natural gas to a utility. The court of appeals rejected this argument factually by holding that state law does permit producers to seek an increase. Pet. App. 25a (citing *Sullivan* v. *PSC*, 287 N.W.2d 188 (Mich. Ct. App. 1979)).

Undaunted by this setback to the premise of their constitutional argument, petitioners then assert vigorously (Pet. 12-13) that the court of appeals' interpretation of state law is wrong. That, however, is strictly a question of state law and not a question this Court can entertain. Accordingly, because the predicate assumption of disparate treatment under state law is inaccurate, there is no colorable equal protection problem here.

Of course, even if Michigan conferred a right on public utilities that it did not grant to producers, that would not remotely raise a serious equal protection issue. This

is classic economic regulation, which is subject to rational basis scrutiny. See, *e.g.*, *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303-06 (1976). It is surely rational to conclude that the State has a greater interest in protecting the well being of public utilities whose mission is to serve the public interest than of private natural gas producers whose economic conduct is largely unregulated.[2]

Even if the legal issue were much stronger, there is no indication that this scheme of regulation operates anywhere outside of Michigan, which makes the issue of extremely limited importance. In sum, the issue is not worthy of this Court's review.

2. Petitioners argue (Pet. 16-17) that the PSC's regulation of the cost term in their contracts constitutes an "impairment of contract" in violation of the Contract Clause of Article I, Section 10 of the Constitution. The court of appeals rejected this argument following the reasoning in its previous decision in *Antrim Resources* v. *Public Service Commission*, 446 N.W.2d 515 (Mich. Ct. App. 1989), that the statute granting the Commission the authority to regulate the price term in contracts with utilities predated by more than 50 years the parties' decision to enter their contract in August 1989 to modify the price term. Thus, the contract was entered into subject to the statutory oversight of the PSC. Therefore, the

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[2] Petitioners assert (Pet. 15) that no "public purpose" is served by regulating the price at which gas is sold to respondent because the public is protected by the Commission's ability to refuse to allow unreasonably high costs to be passed through to consumers. But this ignores that protecting ultimate consumers is not the only objective of Act 9. It also is designed to "control and regulate corporations . . . engaged in the business of purchasing or selling or transporting natural gas for public use." *Antrim Resources* v. *Public Serv. Comm'n*, 446 N.W.2d 515, 518 (Mich. Ct. App. 1989). It cannot be gainsaid that escalating costs can jeopardize the viability of an entity, like respondent, that serves the public interest. Protecting against that event is more than enough "public purpose" to satisfy the minimal demands of equal protection.

refusal of the PSC to give approval of a contract term it found to be unjust and unreasonable in no way impaired this contract. Pet. App. 27a; *Antrim Resources*, 446 N.W.2d at 520-21 (citing *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 429-30 (1934)).

Petitioners' answer is that an agency's or court's interpretation of a statute can violate the Contract Clause. It is difficult to understand how that argument establishes any impairment of petitioners' contract. The statute still makes the contract subject to PSC approval; refusal to approve is thus a completely reasonable and foreseeable consequence of the agreement, not an impairment of that agreement. Accordingly, the constitutionality of the Michigan law as applied by the PSC is much stronger than the actions upheld by this Court in *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983).

3. Petitioners challenge (Pet. 18) the statute on due process grounds on the basis that there are no standards with respect to the Commission's power to approve a price change. In the first place, this argument really poses more of an excessive "delegation" of legislative authority to an administrative agency issue than a due process concern. Of course, as a delegation problem it implicates solely matters of state law.[3] But even viewed as a due process issue, the argument simply ignores the state court's decision that the PSC must apply a "just and reasonable"

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[3] Petitioners purport to raise (Pet. 19-21) "separation of powers" issues, but they plainly do not involve any questions of federal law. Michigan is free to structure its separate branches of government as it sees fit. There is no federal constitutional restriction on how a state legislature delegates either legislative or judicial functions to administrative agencies. If Michigan does not follow the federal model that is of no concern to this Court. Indeed, arguably the Tenth Amendment protects Michigan's right to order its own internal affairs without interference by the federal government. *Cf. Coyle* v. *Smith*, 221 U.S. 559, 565 (1911) (federal government cannot dictate location of state capitol).

standard that is based primarily on the market price of gas. Pet. App. 21a-22a (citing *Antrim Resources, supra*). Certainly, that standard, which is embodied in virtually every federal delegation of power to an administrative agency, raises no serious due process objection. See *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968) ("just and reasonable" is not too vague); *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29 (1963) ("unreasonably low price" not too vague); *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337 (1952) ("so far as practicable" not vague).

4. Finally, petitioners raise two additional procedural due process issues. First, they complain that the court of appeals did not dwell at length on their constitutional issues. Of course, there are two reasons for this: 1) the issues warrant only a perfunctory answer because they are not substantial and 2) at least some of the issues already were disposed of by the court in a written opinion in *Antrim Resources*. In any event, the issues were squarely addressed *de novo* by the court of appeals and that is all the process that any litigant is due.

Second, they complain (Pet. 23-24) that the overall standard of judicial review of PSC orders is unduly narrow. To the extent the argument is aimed at petitioners' constitutional issues, it is manifestly wrong. The court of appeals reviewed those issues *de novo*. To the extent the argument criticizes the scope of judicial review of an agency's factfinding, it surely raises no question of federal constitutional law. Judicial review that is deferential to an administrative decision still satisfies due process, absent evidence of official bad faith or misconduct. See, *e.g.*, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (agency decisions supported by heavy presumption of validity on judicial review). The PSC certainly accorded petitioners ample opportunity to present their case and examined the matter at length. Judicial scrutiny

to ensure that all the bases were touched by the agency is normal and certainly constitutional.

* * * *

Petitioners' efforts to dress their case in constitutional garb ultimately must fail. It is plain that this case involves nothing more than a naked set of state law issues that were exclusively the province of the court below, were properly decided by that court, and do not warrant further review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID A. MIKELONIS
JON R. ROBINSON
FRANK R. KNOX
FRANCIS X. BERKEMEIER
CONSUMERS POWER COMPANY
212 W. Michigan Avenue
Jackson, Michigan 49201
(517) 788-0550

CARTER G. PHILLIPS *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Respondent Consumers Power Company

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* Counsel of Record